Legal Legitimacy through Judicial Failure: Legal Consciousness, Hegemony, and the Paradoxical Role of Political Trials

Extended Abstract, SSHA Submission

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This article examines the ways in which legal consciousness is both shaped by and refracted through political trials. Using the New Haven Black Panther trials of 1969-71 as a case study,[1] I argue that political trials serve as a key forum through which hegemonic "legality" (Silbey 2005) – the product of overlapping forms of legal consciousness – is (re)produced. The New Haven trials, in concert with other high-profile criminal trials of the 1960s, including that of the "Chicago 8," in which Bobby Seale was bound and gagged, illuminated the political and racially repressive dimensions of the judicial system in the public eye. During the New Haven trials, I argue, the white liberal mainstream reconciled a deep-seated faith in the American Constitution and courts with a growing sense of unease over such injustices by developing a justificatory schema designed to vindicate the courts. In this schema, the mere judicial recognition of the limited capacity of the court to fairly try Black revolutionaries, given the charged political circumstances surrounding the case, was cited as its own form of justice. The judge's decision to declare a mistrial, in other words, engendered a form of liberal legal consciousness that narrowly conceptualized "justice" as the ability of the court to acknowledge its own limitations (as opposed to redressing racist legal norms and procedures themselves). This schema ultimately diverted attention from racial logics embedded within the legal system and

[1] This essay is one chapter of my dissertation, a larger comparative research project centered on several other political trials of the 1960s, including those of the "Chicago 8" and the "Panther 21."

instead problematized the polarized public atmosphere surrounding the case and trial and the threat it posed to the possibility of a fair and "impartial" trial.

Situating the trials as a "social drama" (Alexander 2017; Turner 1982) in which racism and the American judicial system itself were "on trial," I argue that a perceived constitutional breach – the constitutional violations the New Haven Panthers and countless other BPP activists faced in court – prompted a collective effort at normative "reintegration" (Turner 1982), or the rehabilitation of the court system. The justificatory schema I identify sheds theoretical light on the discursive mechanisms through which moments of constitutional rupture, perhaps paradoxically, can re-inscribe the hegemonic power of law.

While the hundreds of trials involving revolutionary activists in the 1960s have long fascinated social scientists and legal scholars (Brigham 1996), little attention has been given to political trials in legal consciousness literature. Yet the fact that these highly publicized trials play out as social dramas in the "court of public opinion" lends a narrative quality to trials that, given their progression in "real time," has the capacity to prime public understandings of just what the law "is" and "does." This theoretical lacuna is particularly puzzling given the fact that legal consciousness scholarship is predicated on the notion that social understandings of law's (il)legitimacy stem from practical experiences and direct observations of legal activity rather than generalized abstractions (McCann 1994).

This omission is perhaps reflective of the fact that the legal consciousness field as a whole largely foregrounds the ways that legally derived concepts and idioms constitutively infuse social identities, relationships, norms, and understandings on an individual or group level– as opposed to examining large-scale events or critical junctures that play out as mass-mediated social dramas. In fact, some "hegemony" scholars have explicitly called for an empirical pivot

away from highly public events like criminal trials, in favor of an emphasis on the ways in which law retains its hegemonic force by quietly "saturating" everyday life through traffic rules, property disputes, sales contracts, copyright and warning labels, and so on (Silbey 2005). Yet, given the fact that legal consciousness scholarship, and the "hegemony school" in particular, analytically foregrounds the "hegemonic force of the liberal state's legal system," as Halliday (2019) recounts, this essay argues that it is imperative to examine the large-scale mechanisms through which legal hegemony is actually produced by the state and liberal actors.

This article does so through a qualitative study of public reactions to the New Haven Black Panther trials of 1969-71, in which eight members of the New Haven Black Panther Party as well as BPP co-founder Bobby Seale were indicted on charges related to the murder of an alleged police informant. I give particular attention to the writings of white liberal intellectuals, journalists, lawyers, academics, and social justice activists. I examined several hundred documents including personal memoranda and reflections on the trials, amicus curiae briefs, newspaper articles, academic articles, firsthand accounts of student and Panther-led protests at Yale, trial transcripts, and more in Yale University's Sterling and Beinecke archives.

I focus my analysis on liberal reactions to the joint trial and verdict for Bobby Seale and New Haven BPP leader Ericka Huggins. BPP members and their leftist allies argued that Seale and Huggins were being tried as part of a larger federal initiative to destroy the Black Panther Party, given the fact that evidence for their involvement in the murder was tenuous at best. Following a record-long *voir dire* (jury selection) process and a deadlocked jury, the judge declared a mistrial, declaring that only "superhuman efforts" would render it possible to impanel a truly impartial jury (Oelsner 1971). While the judge conceded that constitutional safeguards against racial bias (*voir dire*; peremptory challenges) had essentially failed, I argue that this had

the paradoxical effect of bolstering support for constitutionalism on the part of the white liberal mainstream. The declaration that the system was simply "not equipped" to try Black revolutionaries fairly (Oelsner 1971) in fact prompted a host of white liberal academics, activists, lawyers, journalists, and professors to declare that justice had been served. In other words, the judicial recognition that the trial proceedings were not fair was itself cited as a fair outcome. As Yale President Kingman Brewster put it, the ability of the judge to assess the situation with a kind of cool-headed rationality and to demonstrate "immunity from public pressure" evinced the notion that "constitutional values are still lively" (*The Boston Globe* 1971:18).

This process – the legitimation of liberal legalism as a result of the exposure of its inadequacies – adds a key dimension to the three-tiered, ideal typical schema of legal consciousness developed by Ewick and Silbey in their seminal book, *The Common Place of Law* (1998). They identify three countervailing narratives about the role of law, arguing that their contradictory nature in fact constitutes law's hegemonic power. Because each schema can be invoked to invalidate the others, this renders it difficult to singularly pinpoint law's shortcomings (Kostiner 2003). For instance, "before the law" narratives depicting law as an egalitarian, external set of abstracted values can refute the relevance of its role in everyday life, in which individual stories of unfair legal treatment ("against" the law narratives) are rejected as idiosyncratic. Similarly, while the New Haven trials were cited by leftist activists as a key instantiation of the racist foundations of the legal system, such assertions were offset by liberal actors' insistence that the judicial recognition of the system's own limitations was in fact a form of justice. Law's legitimacy, then, may not only be affirmed by invocations of abstract understandings of its egalitarian potential ("before the law" narratives) but paradoxically by citations of its own limitations.

REFERENCES

Alexander, Jeffrey C. 2017. *The Drama of Social Life.* Malden, MA: Polity.

The Boston Globe. 1971. "Brewster Optimistic about US." June 14, p. 18.

Brigham, John. 1996. *The Constitution of Interests: Beyond the Politics of Rights*. New York: NYU Press.

Ewick, Patricia, and Susan S. Silbey. 1998. *The Common Place of Law: Stories from Everyday Life*. Chicago: University of Chicago Press.

Halliday, Simon. 2019. "After Hegemony: The Varieties of Legal Consciousness Research." *Social & Legal Studies* 28(6):859-878.

Kostiner, Idit. 2003. "Evaluating Legality: Toward a Cultural Approach to the Study of Law and Social Change." *Law and Society Review* 37(2): 323-368.

McCann, Michael W. 1994. *Rights at Work.* Chicago: University of Chicago Press.

Oelsner, Lesley. 1971. "Juries: The Tough Job of Finding 12 Who Are Impartial," *The New York Times*, May 30, p.E6.

Silbey, Susan S. 2005. "After Legal Consciousness." *Annual Review of Law & Social Science* 1:323-68.

Turner, Victor. 1982. *From Ritual to Theater: The Seriousness of Human Play*. New York City: Performing Arts Journal Publications.